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SUBJECT: Responses to Commission Communication on Company Law and Corporate Governance

T-IA-F-03-0064

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Reftel Frankfurt 10696 (2002)

1. (SBU) Summary: The European Commission has published a synthesis of the results of the consultation on its Communication on "Modernising Company Law and enhancing Corporate Governance in the European Union". While there was widespread support for a very large majority of the proposals, some concerns on specific measures or their legislative nature were expressed, for instance concerning the use of directives in the field of corporate governance, which may not take sufficient account of national legal frameworks and traditions. End summary.

2. (SBU) The European Commission has published a synthesis of the results of the consultation on its Communication on "Modernising Company Law and enhancing Corporate Governance in the European Union". The Action Plan set out in the Communication had been adopted in May 2003. It proposed a number of initiatives aimed at strengthening shareholders' rights, reinforcing protection for employees and creditors and increasing the efficiency and competitiveness of European business. Moreover, a series of proposed corporate governance initiatives aims at boosting confidence in the capital markets.

3. (SBU) The Plan was open for public consultation until mid-September. The Commission received 114 responses, mainly from industry representatives, institutional investors, financial service providers and associated professions. Few respondents commented on all points of the Action Plan but only to the issues of greatest concern to them. Thus, in the following reference to a "majority of respondents" always means a majority of those who commented on a specific issue.

General Comments

4. (SBU) The Commission stresses that there was widespread support for a very large majority of the proposals for legislative and non-legislative action and that most responses also agreed to the timing envisaged for the realization of the Action Plan and the prioritization order of the individual measures. Nevertheless some concerns on specific measures or their legislative nature were also expressed.

5. (SBU) The large majority of respondents considered the Commission's approach combining self-regulatory market solutions, co-ordination of corporate governance codes and legislation as appropriate. Several respondents, however, expressed their concerns about an apparent contradiction between the Commission's declared aim to avoid over-regulation and the establishment of an extensive legislative program, in particular the use of directives in the field of corporate governance. It was generally argued that directives are not an appropriate instrument in this area due to their lack of flexibility and the risk they could be followed by further overly prescriptive and detailed implementing measures. Thus, a large number of respondents favored a more extensive use of recommendations, which would allow for adjustments to national legal frameworks and traditions. Moreover, many respondents commented that the Commission's timing might be too ambitious and would not leave enough time for proper consultation of all interested parties. It was also suggested to subject the main measures of the Action Plan to detailed impact analysis.

Comments Regarding Corporate Governance

6. (SBU) The very large majority of respondents agreed

with the Commission's assessment that there is no need for an EU corporate governance code, but that systems can be expected to develop and progress in a "natural" way under market pressure. General agreement was expressed on the principle of enhanced corporate governance disclosure. However, many respondents would prefer a recommendation over a directive as an instrument for introducing some disclosure requirements. Concerns were also expressed about the potential duplication of existing requirements under national legislation, about the scope of the required Corporate Governance Statement and its inclusion in the annual reports.

17. (SBU) The general feeling was that greater accountability of institutional investors should be ensured. However, the Commission's legislative initiative to that end was received much more cautiously by the majority of respondents. There was wide support for the Commission's view that institutional investors should not be required to systematically exercise their voting rights.

18. With regard to the objective to strengthen shareholders rights, broad support was expressed for encouraging the use of electronic facilities for receipt and dissemination of information, provided that this was not made mandatory. A very large majority of respondents supported the proposal in the Action Plan to develop a regulatory framework to encourage the exercise of various shareholders' rights in listed companies and to solve problems related to cross-border voting. This legislative proposal was the one most positively received. Very diverging views were, however, expressed on the proposal to establish the "one share = one vote" principle throughout the EU.

19. (SBU) A significant majority of respondents welcomed the Commission initiative to prepare a recommendation aiming at strengthening the role of independent executive and supervisory directors. A very large majority suggested that the responsibility for identifying candidates to fill board vacancies should in principle be entrusted to a group composed mainly of independent non-executive directors. Moreover, many requested that with regard to the number of mandates that may be held concurrently a one-size-fits-all approach would take insufficient account of the complexity of individual companies.

Other Issues

10. (SBU) Second Company Law Directive on the coordination of safeguards regarding the maintenance and alteration of EU public limited liability companies' capital: A very large majority of respondents supported the Commission in considering a rapid modernization.

11. (SBU) Disclosure of financial and non-financial information: A small majority of respondents agreed with the Commission on the need for additional measures at the EU level to improve the information disclosed by groups when the parent company is not listed. However, the need to assess carefully the costs and benefits for reporting companies and users of such statements was stressed.

12. (SBU) Tenth Company Law Directive cross-border mergers and Fourteenth Company Law Directive on cross-border transfer of seat: The Commission's intention to present proposals in the short term was supported by a very large majority of respondents.

13. (SBU) European legal statute for small and medium-sized enterprises: The proposal to launch a feasibility study to evaluate the advantages and problems of a possible statute was very well received.

14. (SBU) Comment: The report on the modernization of company law (reftel), which was produced in November 2002 by the so-called Winter group at the request of the Commission recommended a broader use of alternatives to primary legislation through directives. In its Communication, the Commission did not really follow this advice, aiming at relying on directives to a significant extent and not so much on recommendations or other alternatives. Not surprisingly, respondents have criticized this approach. End comment.

15. (U) This cable coordinated with USEU and Embassy Berlin.

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